

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 24 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re BOND FORFEITURE IN
PINAL COUNTY CAUSE
NO. CR-200800344

) 2 CA-CV 2010-0006
) DEPARTMENT A

) MEMORANDUM DECISION

) Not for Publication
) Rule 28, Rules of Civil
) Appellate Procedure
)

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200800344

Honorable William J. O'Neil, Judge
Honorable Boyd T. Johnson, Judge

AFFIRMED

Clifford Sherr

Phoenix
Attorney for Appellants

James P. Walsh, Pinal County Attorney
By Craig Cameron

Florence
Attorneys for Appellee

H O W A R D, Chief Judge.

¶1 Appellants Randolph and Company Bail Bonds and American Surety Company (collectively “the surety”) challenge the trial court’s order forfeiting an appearance bond they had posted on behalf of a criminal defendant. Finding no error, we affirm.

Factual and Procedural Background

¶2 On appeal from a bond forfeiture, we view the facts “in the light most favorable to supporting the trial court’s judgment.” *In re Bond Forfeiture in Pima County Cause No. CR-20031154*, 208 Ariz. 368, ¶ 2, 93 P.3d 1084, 1085 (App. 2004). In March 2008, the surety posted bond in the amount of \$100,000 on behalf of criminal defendant Joan Ramsay. Pursuant to a plea agreement, Ramsay subsequently pled guilty to two charges in a multiple-count indictment. The court accepted the plea and set the matter for presentence hearing and sentencing on February 2, 2009. Ramsay appeared for sentencing on that date, but, pursuant to her counsel’s request, the court continued the sentencing and reset the matter for a presentence hearing and imposition of sentence for March 6. Referring to the presentence report’s recommendation that Ramsay be sentenced to prison, the court informed her she should “be prepared not to go home” after the March 6 hearing in the event the court decided to follow the report’s recommendation. The court did not remand her into custody but warned her that if she failed to appear the court would issue a warrant for her arrest.

¶3 Ramsay ultimately failed to appear for sentencing, and the trial court issued an arrest warrant. More than a month later, the state moved that the bond be forfeited and a different division of the superior court set the matter for a hearing.

¶4 In anticipation of the hearing, the surety submitted a “memorandum . . . in support of exoneration of bond” claiming that the bond should not be forfeited because the criminal court should have ordered Ramsay incarcerated before she was sentenced and, in failing to do so, violated Rule 7.2(c)(1), Ariz. R. Crim. P. The bond forfeiture court transferred the case back to the criminal court for a decision on the alleged Rule 7.2(c)(1) issue. That court concluded “there was no violation of Rule 7.2(c)(1)” because as of February 2, 2009, it had not determined ““in all reasonable probability”” Ramsay would be

sentenced to prison. The court then transferred the case back to the referring court “for further proceedings regarding bond forfeiture.” After a hearing in November 2009 that the attorney for the surety failed to attend, the bond forfeiture court ordered the bond forfeited. This appeal followed.

Trial Judge’s Decision not to Order Ramsay into Custody

¶5 As a preliminary matter, the state contends that the time to appeal the criminal court’s decision that it was not required to order Ramsay into custody pursuant to Rule 7.2(c)(1) has expired, suggesting the surety cannot, therefore, challenge that ruling at this juncture. But the surety’s notice of appeal from the final order on the bond forfeiture necessarily includes any intermediate orders that affected the court’s ultimate decision, such as the criminal court’s determination that it had not violated Rule 7.2(c)(1). *See* A.R.S. § 12-2102(A) (appellate review includes “any intermediate orders involving the merits of the action and necessarily affecting the judgment”); *see also State v. Empire Am. Bail Bonds, Inc.*, 191 Ariz. 218, ¶ 5, 953 P.2d 1271, 1273 (App. 1998) (bond forfeiture proceedings civil in nature). Accordingly, we address the merits of the surety’s claim.

¶6 The surety first argues that the bond forfeiture court erred in forfeiting its bond because the criminal court violated Rule 7.2(c)(1) by not ordering Ramsay to be taken into custody at the February 2 hearing and that it was thereby prejudiced. We review an order forfeiting a bond for an abuse of discretion but consider de novo the construction of statutes and court rules governing bonds. *See State v. Copperstate Bail Bonds*, 222 Ariz. 193, ¶ 12, 213 P.3d 342, 344 (App. 2009). Because the crux of the argument is the criminal court’s application of the rule to these facts, rather than the meaning of the rule, we review for an abuse of discretion.

¶7 The surety relies on *State v. Rogers*, 117 Ariz. 258, 571 P.2d 1054 (App. 1977), and *State v. Jackson*, 184 Ariz. 296, 908 P.2d 1081 (App. 1995), to support its

“prejudice defense.” But both of these cases address the court rule requiring a timely hearing on bond forfeiture; neither establishes a separate prejudice defense or requires even a partial exoneration of the bond when the trial court fails to comply with the rule. *Jackson*, 184 Ariz. at 300-01, 908 P.2d at 1085-86; *Rogers*, 117 Ariz. at 261, 571 P.2d at 1057. Thus, *Rogers* and *Jackson* do not apply here.

¶8 The surety further implies that the criminal court’s alleged violation of Rule 7.2(c)(1) is a mitigating factor under *State v. Old West Bonding Co.*, 203 Ariz. 468, ¶¶ 25-26, 56 P.3d 42, 49 (App. 2002). In that case we listed several circumstances, including “any other mitigating or aggravating factors,” that a court may consider when it rules on whether a bond should be forfeited and whether the forfeiture should be complete. *Id.* ¶ 26. Even assuming, without deciding, that the surety has standing to raise the criminal court’s alleged breach of a rule of criminal procedure, and that such a breach could be a mitigating circumstance under *Old West Bonding*, we can find no abuse of the bond forfeiture court’s discretion here.

¶9 Rule 7.2(c)(1) provides:

After a person has been convicted of any offense for which the person will in all reasonable probability suffer a sentence of imprisonment, the person shall not be released on bail or on the person’s own recognizance unless it is established that there are reasonable grounds to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in any post-conviction proceeding.

¶10 After the surety posted her bond, Ramsay and the state entered into a plea agreement, which the criminal court accepted. The plea agreement set forth the range of a prison term to which Ramsay was exposed. But it also provided that probation was available, establishing the possibility that Ramsay would not be sentenced to prison at all. Although the presentence report did recommend that Ramsay receive the presumptive

prison term, the court was not bound by this report. *See State v. Toulouse*, 122 Ariz. 275, 278, 594 P.2d 529, 532 (1979). And, in the September minute entry, the criminal court acknowledged the existence of mitigating factors, including Ramsay's age, her strong family support and the fact that almost ten years had passed since her most recent conviction, which would have justified the imposition of a term of probation rather than imprisonment. As we previously noted, the court stated it had not determined at that point that a prison sentence would "in all reasonable probability" be imposed. Therefore, we conclude that the criminal court did not abuse its discretion by finding the probability that Ramsay would be sentenced to a term in prison was insufficient to have required it to order her into custody pending sentencing.

¶11 The case the surety cites in support of this argument does not merit a different conclusion. In *State v. Kearney*, 206 Ariz. 547, ¶¶ 14-15 & n.6, 81 P.3d 338, 343 & n.6 (App. 2003), this court addressed the history of the rule, noting that its original purpose was to prevent people from committing other crimes while out on bond, not to prevent them from jumping bond. The court then concluded that unless a defendant will, in all reasonable probability, be sentenced to a term of imprisonment, it is within the trial judge's discretion whether to permit the defendant to remain released on bond pending sentencing. *Id.* ¶¶ 4, 15, 17. We have concluded the criminal court did not abuse its discretion in determining the rule's requirement that Ramsay be taken into custody had not been triggered. Accordingly, the bond court did not err in ordering the surety's bond forfeited.

Order to Forfeit \$100,000 Bond

¶12 The surety next argues that the bond forfeiture court abused its discretion by ordering the entire bond forfeited rather than forfeiting only a portion of the bond upon consideration of relevant mitigating factors. However, the sole mitigating factor that the

surety claims the court should have considered was the alleged violation of Rule 7.2(c)(1), the subject of the first argument it raised on appeal. And we have concluded there was no such violation. Consequently, the court did not abuse its discretion by ordering that the entire amount of the bond was forfeited. *See Copperstate Bail Bonds*, 222 Ariz. 193, ¶ 12, 213 P.3d at 344.

Disposition

¶13 Based on the foregoing, we affirm the trial court's order forfeiting the surety's appearance bond.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge